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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

SAVANNAH SUGAR REFINING CORPORATION, *Petitioner,*

versus

ADAM BAXTER, *Respondent.*

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner seeks certiorari to review a judgment of the Court of Appeals for the Fifth Circuit, and in support of its petition respectfully shows:

OPINION BELOW AND JURISDICTION

The case was tried before the Honorable Anthony A. Alaimo, Judge, United States District Court, Southern District of Georgia, who entered his Order on October 6, 1972, which is reported at 350 F.Supp. 139.

The Court of Appeals for the Fifth Circuit rendered its opinion on June 6, 1974, reported at — F.2d —. The Court of Appeals refused a petition for a rehearing on July 9, 1974.

The Order of the District Court, the Opinion of the Court of Appeals, and the Order refusing the petition for rehearing are printed in the Appendix hereto.

Jurisdiction of this Court lies under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

The questions presented are:

1. Has the Fifth Circuit Court of Appeals decided an important federal question in a way which conflicts with applicable decisions of this Court by allocating the order and burden of proof in a manner that is inconsistent with the Court's decision in *McDonnell Douglas Corporation* v. *Green,* 411 U.S. 792, 36 L.Ed. 2d 668, 93 S.Ct. 1817 (1973).

2. Is the important federal question regarding the order and burden of proof in a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.,* controlled by the decision in *McDonnell Douglas Corporation* v. *Green,* 411 U.S. 792, 36 L.Ed. 668, 93 S.Ct. 1817 (1973), and if not, should it be settled by a definitive decision of this Court.

3. Does the decision of the Fifth Circuit Court of Appeals reversing and remanding the case to the district court for determination of back pay conflict with the decision of the Third Circuit in *Kober* v. *Westinghouse Electric Corporation,* 480 F.2d 240 (3rd Cir. 1973), the decision of the Sixth Circuit in *Manning* v. *General Motors Corporation,* 466 F.2d 812 (6th Cir. 1972) and the decision of the Ninth Circuit in *Schaeffer* v. *Yellow Cabs, Inc.,* 462 F.2d 1002 (9th Cir. 1972), all of which hold that the award or denial of back pay

is within the sound discretion of the trial court and that such discretion should be exercised in the light of all the circumstances.

4. Does the decision of the Fifth Circuit Court of Appeals conflict with the decision of the Eighth Circuit Court of Appeals in *Parham* v. *Southwestern Bell Telephone Company,* 433 F.2d 421 (8th Cir. 1970), by holding that the good faith positive efforts of Petitioner toward providing equal employment opportunities is irrelevant and is not to be considered by the trial court in the exercise of its discretion to award or deny back pay.

5. Does the decision of the Fifth Circuit Court of Appeals truncating the exercise of the district court's discretion to award or deny back pay conflict with the congressional resolve to place the question of back pay within the sound discretion of the trial court.

STATUTE INVOLVED

The pertinent statute, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) is set forth in the Appendix, *infra,* page 42a.

STATEMENT OF CASE

Petitioner's principal business is the refining, distribution and sale of cane sugar. It was organized in 1917 and maintains its headquarters and executive offices in Savannah, Georgia, and its principal refinery or production facility at Port Wentworth, Georgia. A majority of the employees are engaged in the production, packaging and shipment of sugar. The various job classifications in the refinery are organized into

departments or "stations". Each station involved in the production, packaging or shipment of sugar contains two or more job classifications. As of June 30, 1971 Petitioner employed 433 regular employees at its refinery.

Respondent, Adam Baxter, is an employee of Petitioner, his regular job being that of an electrician's helper, although he also served as relief boiler room helper. Baxter filed this case on March 8, 1968, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (hereinafter referred to as the Act) and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Baxter alleged that he had been unlawfully denied a promotion to a foreman's position in the boiler room.

Trial of this case was had in Savannah, Georgia, before Anthony A. Alaimo, District Judge, on May 28 and 29, 1972. The issues before the court were: (1) was Baxter discriminated against because of his race by not being promoted; (2) did Petitioner discriminate against the class represented by Baxter and if so what remedies, including back pay, were available to correct this discrimination; and (3) was Baxter entitled to an award of attorney's fees.

After extensive briefing by the parties, the District Court entered its Order on October 6, 1972 (App. 1a) and found: (1) the Petitioner had not discriminated against the Respondent Baxter in failing to promote him to the position of boiler room foreman; (2) the Court did not award back pay to the class represented by Respondent in that the Respondent has not proved discrimination against any specific individual in the class and Petitioner had acted in good faith and made a positive effort to eliminate pre-act segregation prac-

tices, and (3) although there was no proof of any discrimination within the class by Petitioner, certain of Petitioner's promotion practices were subjective in nature and the Court entered a decree ordering Petitioner to implement certain objective promotion practices and made an award of attorney's fees to counsel for Respondent of $12,500.00.

On appeal, the Fifth Circuit Court of Appeals affirmed the trial court's holding that Baxter had not been discriminated against, but remanded the case for further hearings to determine the right of class members to back pay and also for the purpose of recalculating the amount of attorney's fees to be awarded to Baxter's attorneys.

The issue on this Petition is that of the remand for further hearings on the issue of back pay.

In his complaint filed March 8, 1968, Baxter sought to represent all blacks employed at Petitioner's refinery at Port Wentworth, Georgia. On December 9, 1968, pursuant to Rule 23(c)(1) of the Fed. R. Civ. Pro., the district court ruled that the cause could proceed as a class action with the class limited to the blacks employed in the boiler room operation. *Baxter v. Savannah Sugar Refining Corporation,* 46 F.R.D. 56 (S.D. Ga. 1968). The Order of the Court made it clear, however, that Baxter was entitled to seek discovery concerning employment practices in all operating departments. The Order was expressly made subject to alteration or amendment at a later date.

Thereafter, and more than two years before trial, counsel for Baxter took only the depositions of the Plant Superintendent and Secretary of Petitioner.

They made no effort to take the depositions of any other plant employees before the trial on May 28, 1972.

Prior to trial, a series of pre-trial hearings were held. At such a hearing on January 18, 1972, the district court advised counsel for all parties that he would not confine the evidence to practices in the boiler room, but would allow evidence of employment practices throughout the plant. At this same hearing the court ordered the parties to exchange lists of witnesses and documentary information.

Baxter's list of proposed witnesses included employees in various departments of the plant. Thus it was patently evident that Baxter was prepared to and planned to introduce evidence of alleged discrimination throughout the plant. As a result, on January 26, 1972, Petitioner took depositions of five of these employees.

Among the many exhibits in this case was Petitioner's Exhibit 35 (R. 830(a)-875(a)), consisting of 45 pages. This exhibit showed the name, race, nature of job promotion, qualifications considered necessary for promotion to each job, and reasons for promotion of every individual promoted in the plant since 1965. Moreover, and more significantly it showed that Petitioner analyzed each job classification and identified the essential skills or traits necessary for successful performance of the job. The "reasons for promotion" reflect why the company chose each employee for each promotion. Also the Petitioner presented Exhibit 36 (R. 878(a)-898(a)) consisting of 20 pages of a similar detailed schedule indicating thereon a job-by-job analysis of the reasons for every person employed at the plant since 1965.

These exhibits were furnished to counsel for Respondent some three weeks before trial, but counsel made no effort of discovery nor did they take depositions of any employees of Petitioner with reference to any of the matters contained in these exhibits.

In this regard it is particularly significant that counsel for Respondent had filed with the court a motion to enlarge the class, and on May 17, 1968, the district court reserved ruling on the motion until trial, but advised all counsel that Respondent would have the right to introduce evidence with respect to plant-wide discrimination. This was a reiteration of the court's previous announcement that it would allow such evidence. On the date of trial the court ruled that the class would include all black employees at the plant.

At trial, Baxter testified and called three of the employees whose depositions had been previously taken by Petitioner as well as a former employee. With the exception of Baxter, none of the other witnesses complained of any white employee having received a promotion over him—in fact they complained of promotions of other blacks. Baxter relied primarily on statistical evidence previously produced by Petitioner which indicated that the average pay received by whites was greater than that received by blacks.

During the course of the trial the personnel counselor of Petitioner reviewed (R. 482a-486a) Petitioner's Exhibit 35 (R. 830a-875a) and supplemented the detailed analysis of the name, race, job description, and qualifications of every person promoted in the plant since 1965 with further explanation of the standards for promotions. Despite this massive exhibit of 45 pages and the testimony in support thereof, Baxter

offered no rebuttal evidence on this point. This evidence of Petitioner stood and remains uncontradicted.

The district court in its Order of October 6, 1972, found:

> "On the other hand Plaintiff has not proved discrimination against any specific individual to the Court's satisfaction." (App. 10a)

The Court did find, however, that Petitioner's promotion procedures might allow the subjective judgment of Petitioner's supervisors to influence promotions.

The Court then found (App. 12a):

> "*In the absence of satisfactory proof of discrimination within the class,* the Court does not find that the employer's promotion practices have, in fact, deprived the class within the prohibitions of 42 U.S.C. Sec. 2000e-2(a)(1) only that such practices *tend* to deprive the class of employment opportunity within the statutory prohibitions of 42 U.S.C. 2000e-2(a)(2)." (Emphasis supplied)

The Court further found no evidence of racial discrimination in Petitioner's system of hiring and also found that the rest rooms, locker and dining facilities at the plant were used by all employees without regard to race. (App. 12a)

With respect to back pay the district court held that two factors combined to make an award of back pay inappropriate.

> "First, the Defendant has acted in good faith and made a positive effort to eliminate pre-Act segregation practices."

"Second, the Plaintiff has failed to produce satisfactory proof that such relief is needed to make the class whole." (App. 13a)

The Court then stated (App. 13a):

"There has been no proof of a significant number of members of the group possessing qualifications who have been damaged by discriminatory practices notwithstanding their qualifications for promotion."

"Additionally, the Court was impressed with the evidence that Defendant's wage rates are higher than those of any other industry in the Savannah Metropolitan area; its unbroken history of annual wage increases to all employees, without any discrimination; its policy, broken only during three Depression years, of 15% annual bonus to all employees; its summer student employment program for employees' children, again without the slightest evidence of any discrimination; its policy of no layoffs when jobs were abolished by automation. In substance, the Court feels that the evidence supports the conclusion that the Defendant was a poor target for this type action." (App. 13a)

Against this background of no proof of discrimination against any individual, the case proceeded to the Fifth Circuit Court of Appeals; and on June 6, 1974, that court entered its decision remanding the case for a determination of those employees who might be entitled to back pay. In so doing the court stated:

"Concerning the burden of proof imposed on the class of discriminatees, we think the district court acted prematurely in requiring individual proof of economic loss and committed error in mandating that an individual establish that he had the prerequisite 'qualifications' for a higher position in

the initial proceedings to ascertain the nature of employment practices." (App. 32a)

"Therefore, there is a strong presumption that a number of the individual members of the class would have received promotions to better paying white positions if Savannah's promotion process had been based on merit." (App. 33a)

There was no finding by the Fifth Circuit Court of Appeals that the trial court had "abused its discretion" in denying back pay to the class, nor was there even an attempt to distinguish the trial court's finding of no discrimination against any individual employee. Rather, it *assumed* that discrimination against class members had occurred from the trial court's finding that certain of Petitioner's practices had an *abstract* tendency to discriminate, notwithstanding the trial court's express finding that as a matter of fact these practices had never operated to discriminate against any class member.

ARGUMENT

THE FIFTH CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN THAT THE FIFTH CIRCUIT HAS ALLOCATED THE BURDEN OF PROOF IN A MANNER THAT IS INCONSISTENT WITH THE SUPREME COURT'S DECISION IN MC DONNELL DOUGLAS CORPORATION V. GREEN, 411 U.S. 792, 36 L.Ed. 2d 668, 93 S.Ct. 1817 (1973)

In *McDonnell Douglas Corporation* v. *Green, supra,* this Court granted certiorari "in order to clarify the standards governing the disposition of an action challenging employment discrimination." This Court then decided the "proper order and nature of proof in

actions under Title VII of the Civil Rights Act of 1964" and provided the following outline:

> Step 1: The plaintiff has the initial burden of establishing a prima facie case by showing (1) that he belongs to a racial minority; (2) that he applied for and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.
>
> Step 2: The employer then has the burden of showing a legitimate, nondiscriminatory reason for plaintiff's rejection.
>
> Step 3: Plaintiff must then be given the opportunity to rebut the defendant's evidence and show that the purported justification was pretextual. Here statistics may be useful in determining whether the employer's actions were part of a general pattern of discrimination against blacks.

While the Court spoke within the framework of discrimination in hiring, the logic and reasoning of the Court's statements apply with equal force to litigation involving discrimination in promotions.

Petitioner submits that the decision of the Court of Appeals is in conflict with that of *McDonnell Douglas Corporation* v. *Green, supra* in that:

1. Respondent did not carry his burden of proof with regard to Step 1 in that no individual discrimination was proved in the district court. The trial court specifically found: "on the other hand, Plaintiff has not proved discrimination against any specific individual to the Court's satisfaction." (App. 10a)

2. The Fifth Circuit Court of Appeals *ignored* the fact that Petitioner carried its burden (Step 2) of proving that there was no discrimination against any employee with respect to promotions.

The Court of Appeals excused Respondent's failure to prove any instance of factual discrimination because in its view, to do so would be unduly burdensome because of the lack of objective criteria and qualifications for promotion. The Court of Appeals thus totally ignored the fact that Respondent was in possession of Petitioner's Exhibit 35 for some three weeks prior to trial. Baxter had more than ample opportunity to offer Step 1 evidence showing that members of the class were qualified for promotion based on the objective standards provided in the exhibit and that non-class members with equal or less qualifications were promoted over qualified class members. The excusal of this failure to prove individual discrimination represents a departure by the Court of Appeals from the standards of *McDonnell Douglas Corporation* v. *Green.*

Petitioner offered proof under Step 2 that showed job related justifications for each promotion since 1965 but Respondent failed to contradict or rebut any of this evidence. The Fifth Circuit thus erred by not requiring Respondent to show that Petitioner's Step 2 justifications were pretextual. To allow Respondent to correct his failure of proof in a subsequent remedy proceeding would destroy the utility of the *McDonnell Douglas Corporation* outline of proof.

Moreover, the Court of Appeals departed from its own standard set forth in *United States* v. *Jacksonville Terminal Company,* 451 F.2d 419, 446 (5th Cir. 1971). There, in a pattern and practice case, the government

ntroduced statistics showing post-Act hiring and job ssignment inequities between blacks and whites. Offi- ials of the employer testified at length to the effect that ll post-Act decisions on hiring and assignment were based solely on qualification and merit. The govern- ment did not attempt to rebut this evidence, but relied exclusively on the statistical evidence previously sub- mitted. The Court of Appeals held that once the em- ployer introduced testimony justifying its actions, it became incumbent upon the government to rebut this testmony by showing that the employer's justification did not coincide with employment reality.

Under the *Jacksonville Terminal* standard, the deci- sion of the trial court in the instant case was due to be affirmed. At trial, Baxter placed into evidence statistics showing an earnings disparity between black and white employees. Petitioner placed its promo- tional system in the record as well as documentary evidence (Ex. 35), supplemented by the testimony of its officers, to the effect that each promotion had been made on the basis of racially neutral objective criteria. Had such discrimination existed, Respondent, at this point, should have attempted to contradict this evidence by showing that qualifications were not job related or that whites were preferred over blacks possessing equal or superior qualifications. Instead, Respondent chose to stand on its previously introduced statistics.

Thus, the Court of Appeals decision giving respond- ent a second opportunity to offer this proof is a depar- ture from its own standards enunciated in *Jacksonville Terminal,* where it stated that *no case* supports the proposition that statistics outweigh a defendant's evi- dence manifesting business necessity for job assign- ment decisions.

By departing from the standards of this Court set forth in *McDonnell Douglas Corporation* v. *Green, supra,* and its own standards in *United States* v. *Jacksonville Terminal Company, supra,* the Fifth Circuit Court of Appeals has in effect denied Petitioner due process of law in violation of the fifth and fourteenth amendments to the Constitution of the United States. In allowing the Respondent to prevail without rebutting Petitioner's proof showing that all promotion decisions were made on a racially neutral basis, the Court of Appeals has, in effect, held that statistics can create an irrebuttable presumption of discrimination. This Court has uniformly held, however, that any irrebuttable presumption is violative of the constitutionally guaranteed right of due process of law. *Cf. Cleveland Board of Education* v. *LaFleur,* — U.S. —, 94 S. Ct. —, 39 L.Ed. 2d 52 (1974); *Vlandis* v. *Kline,* 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed. 2d 63 (1973); and *Stanley* v. *Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972).

In summary, the Court of Appeals has:

1. Ignored the specific finding of the district court that there was no discrimination against any individual.

2. *Assumed* that such discrimination existed, notwithstanding Petitioner's uncontradicted and unrebutted proof to the contrary.

3. Assumed that factual discrimination existed on the basis of statistics alone (Step 3 above) despite the total absence of proof by Respondent establishing a single instance of factual discrimination.

4. Erroneously and prematurely remanded this case to the trial court, thus allowing Respondent to prove individual discrimination in a subsequent remedy proceeding (on the assumption that factual discrimination had been proved) when in fact *no* factual discrimination has ever been proved against Petitioner.

5. Refused to require plaintiff to show any instance of individual discrimination after the employer had effectively and uncontradictedly rebutted plaintiff's statistical evidence, thereby creating an irrebuttable presumption of discriminaton on the basis of statistics alone.

IN THE ALTERNATIVE, SHOULD IT BE DETERMINED THAT THE STANDARD OF PROOF IN MC DONNELL DOUGLAS CORPORATION V. GREEN DOES NOT APPLY TO CLASS ACTION SUITS, THEN THIS CASE INVOLVES A FEDERAL QUESTION OF THE PROPER ALLOCATION OF THE BURDEN OF PROOF WHICH SHOULD BE SETTLED BY THIS COURT.

Petitioner believes that the decision in *McDonnell Douglas Corporation* v. *Green,* establishing the allocation of and burden of proof in a case under Title VII of the Civil Rights Act of 1964, applies as well to class actions instituted under Title VII. There is no valid reason for any difference in the burden of proof in a class action suit under Title VII as compared with an individual suit under the Act. Moreover, Petitioner believes that this was the clear intent of this Court when it stated at the outset of its opinion that "the case before us raises significant questions as to the proper order and nature of proof in *actions* under Title VII of the Civil Rights Act of 1964," and when this Court stated "in order to clarify the standards governing the disposition of an *action* challenging employ-

ment discrimination, we granted certiorari." (Emphasis supplied.)

Should the Court find, however, that the *McDonnell* case is limited to an individual action under Title VII, then the Court should decide the proper allocation of and burden of proof in a class action suit under Title VII just as it did in the individual action presented in *McDonnell.*

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT REMANDING THE CASE TO THE DISTRICT COURT FOR DETERMINATION OF BACK PAY IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL WHICH HOLD THAT THE AWARD OR DENIAL OF BACK PAY IS WITHIN THE DISCRETION OF THE DISTRICT COURT TO BE EXERCISED IN THE LIGHT OF ALL THE CIRCUMSTANCES OF EACH CASE.

The Act clearly provides that the award of back pay is a matter of discretion.

Section 706(g) of Title VII provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court *may* enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as *may* be appropriate, which *may* include reinstatement or hiring of employees *with or without back pay.* 42 U.S.C.§ 2000e-5(g). (Emphasis added.)

In this regard, it is of paramount importance to note the basic finding of the trial court:

> "Plaintiff has not proved discrimination against any specific individual to the Court's satisfaction." (App. 10a)

Moreover, the trial court recognized that Petitioner was fully complying with the provisions of the Act when it stated:

> "The Court is convinced that the employer has willingly and conscientiously taken steps to eliminate pre-Act segregation practices." (App. 9a)

In molding its decree, the trial court provided:

> "5. The Defendant shall continue its current practice of giving qualifications paramount consideration in promoting employees." (App. 15a)

The trial court did order Petitioner to adopt an objective system for promotions wherein it would establish written job descriptions, post job vacancies, allow employees to bid on job openings and establish a review committee so that no employee would be denied promotion or transfer solely for the reason that he is not supported by the recommendation of a supervisor. (App. 15a)

On this point, however, the trial court specifically found:

> "This Court does not find that the employer's promotion practices have, in fact, deprived the class within the prohibitions of 42 U.S.C. Sec. 2002-2(a)(1)—only that such practices tend to deprive the class of employment opportunities within the statutory prohibitions of 42 U.S.C. Sec. 2000e-2(a)(2)." (App. 12a)

Based on the record before it, the trial court was clearly justified in refusing to make an award of back pay. On appeal the Court of Appeals did not find any "abuse of discretion" on the part of the district court in refusing to award back pay nor did it determine that the trial court's findings were "clearly erroneous." The simple truth is that the Court of Appeals could not

find an abuse of discretion or that the trial court's findings were clearly erroneous since there was, in fact, no evidence of discrimination against any specific employee.

In the absence of a finding of an "abuse of discretion" by the trial court or a holding that the trial court's findings of fact were "clearly erroneous", it was error to remand the case on the issue of back pay. By so doing, the Fifth Circuit Court of Appeals is in conflict with the decision of the Court of Appeals for the Third Circuit in *Kober* v. *Westinghouse Electric Corporation,* 480 F.2d 240, 248 (3rd Cir. 1973) the decision of the Court of Appeals for the Sixth Circuit in *Manning* v. *General Motors Corporation,* 466 F.2d 812, 816 (6th Cir. 1972) and the decision of the Court of Appeals for the Ninth Circuit in *Schaeffer* v. *Yellow Cabs, Inc.,* 462 F.2d 1002, 1006 (9th Cir. 1972), all of which hold that the award or denial of back pay is within the sound discretion of the trial court and that this discretion is to be exercised in the light of all the circumstances of each case.

This principal is enunciated succinctly in *Kober* v. *Westinghouse Electric Corporation* 480 F.2d 240 at page 248:

> "(4) The statute says that the court may order such affirmative action as may be appropriate, with or without back pay. It is our determination that this language clearly leaves the award or denial of back pay to the discretion of the district court, to be exercised in the light of all the circumstances of each case."

To the same effect is *Lea* v. *Cone Mills Corporation,* 438 F.2d 86, 87-88 (4th Cir. 1971) which holds that the refusal of the trial court to award back pay is justified when not "clearly erroneous".

The decision of the trial court in denying back pay was correctly made in light of the record before it, and in the absence of a finding by the Court of Appeals that the trial court had "abused its discretion" or that its determination was "clearly erroneous" the denial of back pay by the trial court should have been affirmed.

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HOLDING THAT THE "GOOD FAITH" OF THE PETITIONER IS NOT A DEFENSE OR A CRITERIA TO BE EVALUATED BY THE TRIAL COURT IN DENYING BACK PAY IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME MATTER.

The trial court was impressed with the good faith of Petitioner in complying with the Civil Rights Act of 1964 and said so:

> "The foregoing indicates that the pre-Act pattern of segregated job classifications has been reduced by a significant extent through positive efforts by the Defendant. The Court is convinced that the employer has willingly and conscientiously taken steps to eliminate pre-Act segregation practices." (App. 9a)

> "However, keeping in mind that the Defendant's evidence establishes a positive effort to seek out and promote qualified personnel among its black employees, ..." (App. 12a)

> "In substance the Court feels that the evidence supports the conclusion that the Defendant was a poor target for this type action." (App. 13a)

In molding its decree, the trial court reiterated: (App. 15a)

> "5 The defendant shall continue its current practice of giving qualifications paramount consideration in promoting employees."

> "6 The Defendant shall continue to provide training programs to increase the skills and qualifications of its labor force and enable the employees to qualify for advancement and job transfers."

Despite the findings, the Court of Appeals has now held:

> "It is now settled law in our circuit that good faith is not a defense to an action for class-wide back pay." (App. 31a)

The Court of Appeals based its holding upon the erroneous assumption that "discrimination presently continues" . . . (App. 32a) and upon its "presumption" based on statistics that some class members would have received promotions to better paying white positions (App. 33a), when in fact the trial court expressly found to the contrary.

As shown previously, any presumption of discrimination against any individual employee based on statistics was clearly rebutted by Petitioner's Exhibit 35 (R. 830(a)-875(a)) and by the testimony of its personnel counselor (R. 482a-486a) concerning the job qualifications and reasons for all promotions since the year 1965. This evidence was uncontradicted and unrebutted. Therefore, there was no factual basis for any "presumption" by the Court of Appeals that certain class members would have received promotions.

Moreover, this "presumption" flies in the face of the finding of the trial court that "there was no evidence of discrimination against any individual employee." (App. 10a) This Court, and other lesser courts, have consistently stated that Title VII is humanitarian and remedial in nature. No one could, or would, claim that its scope is limited only to those who seek its protection. It is therefore inconsistent with the very core and purposes of the statute to ignore an employer's

good faith efforts to improve the economic footing of its black employees. To ignore good faith and to award back pay here is to punish an employer who has "willingly and conscientiously taken steps to eliminate pre-Act segregation practices." (App. 9a)

Thus, the "settled law" of the Fifth Circuit Court of Appeals that good faith is not a defense to an action for class-wide back pay is squarely in conflict with the purposes of Title VII as well as the decisions of other Circuit Courts of Appeal which have held good faith a valid defense under the Act. *Parham* v. *Southwestern Bell Telephone Company,* 433 F.2d 421, 429 (8th Cir. 1970) (refusing to grant an injunction because of the good faith of the employer); *Manning* v. *General Motors Corporation,* 466 F.2d 812, 816 (6th Cir. 1972) *cert. den.,* 93 S.Ct. 1366 (1973) (wherein the employer was complying with a state statute); *Kober* v. *Westinghouse Electric Corporation,* 480 F.2d 240 (3rd Cir. 1973) (wherein the employer was complying with a state statute).

THE WRIT SHOULD ISSUE

In *McDonnell,* this Court granted certiorari "in order to clarify the standards governing the disposition of an action challenging employment discrimination".

As in *McDonnell,* this case also "raises significant questions as to the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964".

In the instant case the Fifth Circuit Court of Appeals has departed from the order of and nature of proof laid down in *McDonnell.*

The decision of the Fifth Circuit Court of Appeals involves an important question of the construction of

the Civil Rights Act of 1964, with respect to the discretion granted by the Act to the trial court to award or deny back pay as the trial court may find appropriate under the circumstances.

The decision of the Fifth Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeal with respect to the discretion of the district court in awarding or denying back pay.

The decision of the Fifth Circuit Court of Appeals is in conflict with decisions of other Courts of Appeals with respect to the holding by the Fifth Circuit that the good faith positive efforts of an employer to correct pre-Act discrimination is not a defense or a criteria to be evaluated by the district court in awarding or denying back pay.

It is respectfully submitted that the Writ of Certiorari should issue.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action No. 2304

ADAM BAXTER, *Plaintiff*

v.

SAVANNAH SUGAR REFINING CORPORATION, *Defendant*

ORDER

Plaintiff brought this class action on March 8, 1968, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. He subsequently filed an amendment to include allegations that the Civil Rights Act of 1866, 42 U.S.C. § 1981 also was violated. The amended complaint charges that the defendant employer has discriminated against the plaintiff and the class which he seeks to represent with respect to compensation, terms, conditions and privileges of employment, because of race. Plaintiff's allegations are mainly directed against the defendant's policies and practices in regard to promotion of employees.

Prior to commencement of this action, plaintiff filed a charge of employment discrimination with the Equal Employment Opportunity Commission on January 12, 1966, in accordance with the provisions of the Act,[1] alleging that

[1] 42 U.S.C. § 2000e-5: "(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved . . . that an employer . . . has engaged in an unlawful employment practice . . . the Commission . . . shall make an investigation of such charge. . . . (e) If within thirty days after a charge is filed with the Commission . . . the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge. . . ."

the defendant had failed to promote plaintiff to the position of boiler room foreman or relief foreman because of his race. He now seeks a declaratory judgment, injunctive relief, an award of back pay, attorneys' fees and costs of the action individually and for the class.

Defendant denied all the substantive allegations of the complaint.

The action was tried to the Court on May 29, 1972, following which the Court made a personal tour of defendant's entire operation, and this viewing supports the Court's findings. The Court's findings and conclusions follow.

The Class Action

In limine, a hearing was held under the provisions of Rule 23(c)(1), Fed. R. Civ. P. and this Court ruled on December 9, 1968, *Baxter* v. *Savannah Sugar Refining Corp.,* 46 F.R.D. 56, 58, that the action would proceed with the class being limited to the employees in the boiler room operation with respect to back pay awards or mandatory promotions. The Court's order further made it clear, 46 F.R.D. 56, 61, that plaintiff was entitled to seek declaratory and injunctive relief to prevent future plant-wide discriminatory practices by defendant and that discovery would be permitted pertinent to discriminatory practices in all departments of operation. This order limiting the class was expressly made subject to alteration or amendment at a later date.

The plaintiff subsequently filed a motion to enlarge the class, which was heard on May 17, 1972. At that time the Court advised counsel for both parties that the admission of evidence on trial of the case would not be limited to the class as previously described by this Court's order of December 9, 1968, and that the Court would allow evidence concerning plant-wide discrimination.

Before proceeding to a final decision, it is appropriate at this point to re-define the class represented by plaintiff.

This is militated by the evidence adduced on trial of the case and by decisions rendered subsequently to this Court's order limiting the class.

> "While it is true, as the lower court points out, that there are different factual questions with regard to different employees, it is also true that the 'Damoclean threat of a racially discriminatory policy hangs over the racial class [and] is a question of fact common to all members of the class.' " *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5 Cir. 1969).

Note that a portion of the decision in the *Johnson* case dealing with a claim for back pay contained no language either limiting or broadening the class with specific reference to this form of relief. While Rule 23(b)(2) contains a pointed reference to "injunctive relief or corresponding declaratory relief," it contains no language limiting it to those types of relief, and it does not support the proposition that no monetary relief may be ordered in a class action under Rule 23(b)(2). *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4 Cir. 1971).

> "We are . . . unable to perceive any justification for treating such a suit as a class action for injunctive purposes, but not treat it so for purposes of other relief." *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7 Cir. 1969).

Although the Court does not make an award of back pay herein, the plaintiff will henceforth be deemed to represent Negro employees in all departments of operation in defendant's refinery with respect to all forms of relief afforded by the Act. Enlargement of the class at this time can be effected without notice to any members since this action was brought pursuant to Rule 23(b)(2), under which such notice is not mandatory. *Johnson* v. *City of Baton Rouge, Louisiana*, 50 F.R.D. 295 (E.D. La. 1970), and *Northern Natural Gas Co.* v. *Grounds*, 292 F. Supp. 619, (D. Kansas 1968).

THE INDIVIDUAL PLAINTIFF

The defendant's principal business is refining, distribution and sale of cane sugar. The refinery is located at Port Wentworth, Georgia, and defendant maintains executive offices in downtown Savannah. Defendant is an employer within the meaning of 42 U.S.C. § 2000e(b) of the Act.

The plaintiff has been employed by the defendant at its refinery since June 27, 1955, having begun as a general laborer at $1.33 per hour. He is now employed at $3.51 per hour as a senior electrician's helper. He began work in defendant's electric shop on July 1, 1957, where his duties consisted of cleaning electric motors, replacing light bulbs, assisting in the cutting of conduit pipe, and assisting electricians in the performance of their duties. On September 7, 1959, the plaintiff started working as a relief helper in the defendant's boiler room, where he substitutes for regular boiler room helpers on weekends and holidays and when the regular employees are absent or on vacation. While working in the boiler room the plaintiff has been paid at his regular rate as an electrician's helper as that rate is higher than the boiler room helper's rate. The plaintiff's duties as relief helper in the boiler room consist of opening and closing valves as directed by the foreman, carrying boiler water samples to the plant laboratory for analysis, and performing housekeeping chores.

The boiler room supplies all the electrical energy and steam used by defendant in operation of the refinery. It is the heart of the refinery and contains equipment exceeding a million dollars in value. The boiler room operates twenty-four hours a day, seven days a week and is manned on a three-shift basis, with two employees assigned to each shift, one foreman and one helper. Three employees are classified as boiler room foreman and three as boiler room helpers. In addition, there are one or more relief foremen and one or more relief helpers. The primary jobs of these relief employees are elsewhere in the refinery and they are used in the boiler room on a temporary basis.

The boiler room operator, or foreman, is required to read and monitor in excess of thirty dials and guages, which record critical information such as the steam pressure and water flow of the three high-pressure steam boilers, the chemical content of incoming boiler feed water and the sugar content of water coming to the boiler room from the refining process. Each hour, during his shift, he determines the consistency of incoming boiler feed water with a chemical analysis kit maintained in the boiler room. He is responsible for recording steam, water flow, gas and fuel oil measurements in a boiler room log, which is used by defendant's engineering department to determine operational efficiency and the necessity for any corrections. The boiler room foreman is responsible for operating the char revivifier, essential to the refining process, and the turbo generator which produces the plant's electricity. It is incumbent upon him to notify the appropriate personnel in the event of any malfunction or emergency. The boiler room foreman is also in charge of plant security on weekends and after 4:30 p.m. weekdays.

The personal viewing of the boiler room operation by the Court disclosed that it was a highly sophisticated and complicated operation.

The duties of boiler room foreman demand a conscientious person with a thorough knowledge of the complicated automated equipment of the boiler room and the ability to foresee necessary changes and adjustments which must be made in the equipment that controls the steam load and insures the safety of the three boilers. Past experience has made it apparent that mechanical background and aptitude are necessary for operations and well-nigh indispensable to the integrity of the entire plant operation. The employees who have successfully performed as boiler room foremen or relief foremen have had mechanical backgrounds as either general mechanics or pipefitters, or have had previous experience in the operation of a boiler room. The performance of the helper's job does not give one sufficient

training and experience to perform successfully as foremen. A six-month training period is normally necessary for the foreman's job, to train an individual who already possesses a mechanical beckground.

There have been two vacancies in the boiler room foreman's classification since the effective date of the Act. The first of these vacancies was filled on January 1, 1966, when Euless Hodges was promoted from the senior pipefitter's classification. Hodges, employed since October 11, 1954, had been a relief boiler room foreman since November 29, 1954. The second vacancy was filled on June 6, 1966, when Joseph C. Brinson was promoted from the classification of packaging department mechanic. Brinson was employed initially on February 14, 1957, and began working as a relief foreman in November, 1965. Two employees have been trained as relief foremen in the boiler room since the effective date of the Act. Dennis Holiday, a senior mechanic in the Company's general mechanics department, began training on April 28, 1967; and Frank Williams, a Black, who is a senior pipefitter in the general mechanics department, began training on July 13, 1968. These four men were significantly better qualified and possessed superior mechanical backgrounds than plaintiff for the job of foreman or relief foreman in the boiler room.

Eleven persons were employed in the defendant's electrical department at the time of this trial. Eight of the eleven were employed in classifications paying more than the classification in which plaintiff is employed. Seven of these eight persons have worked in the Company's electric shop longer than plaintiff. Since the effective date of the Act, there have been no vacancies and therefore, no promotions in jobs in the electrical department paying more than that of plaintiff.

The plaintiff has been given written warnings on four occasions for failure to perform his work properly and for violation of plant rules. He has an unfavorable personnel

record and what is considered a bad attitude toward his work, as evidenced by the testimony of numerous witnesses and his demeanor in the courtroom. He has been given the opportunity on three different occasions to transfer into the boiler room as a regular helper, but has refused the transfer on each occasion. Moreover, plaintiff does not have a mechanical background as do all the four men promated to the position of boiler room foreman or trained as relief foreman since the effective date of the Act. Each of those promoted had significantly better qualifications than plaintiff. The Court finds that the defendant has not discriminated agianst the individual plaintiff because of his race in failing to promote him to the position of boiler room foreman or relief foreman.

> "Although Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act, it certainly did not desire to melt job qualifications having no racially discriminatory ingredient or controlling pre-Act antecedent." *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, (5 Cir. 1971). See also *Griggs* v. *Duke Power Co.*, 401 U.S. 424 at 430, 91 S.Ct. 849 at 853, and *Cooper* v. *Ivan Allen, Jr., Mayor*, — F.2d —, (No. 71-3186, 5 Cir. 1972).

THE ISSUE OF CLASS-WIDE DISCRIMINATION

Baxter's failure to establish his claim for individual relief will not bar relief for the class he represents. *Bowe* v. *Colgate Palmolive Co.*, 416 F.2d 711 at 719; *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 428 (8 Cir. 1970). It is therefore necessary to consider evidence pertaining to plant-wide discrimination at defendant's refinery.

On the effective date of the Act, the defendant employed 505 regular employees at its refinery and 319 of these, or 63.2 percent, were Black. At that time, the Company had fifty-four job classifications which contained more than one person. Three of these classifications were integrated,

twenty-six were held by Whites only, and the remainder by Blacks only.

Since 1960, when it employed approximately seven hundred regular employees, the Company has experienced a gradual decline in employment which resulted from automation of the defendant's processes and the development and use of new types of machinery. The defendant's total employment of regular employees declined by 14 percent between July 2, 1965, and June 30, 1971, as by then the regular employees numbered 433 at the refinery, of which 272, or 62.8 percent, were Black. By July 30, 1971, there were fifty-five job classifications containing more than one employee. At that time the integrated classifications had increased to thirteen and the number of classifications, including Whites only, had decreased to eighteen.

From January 1, 1966, through January 1, 1972, defendant hired forty-nine new employees. Twenty-seven, or 55 percent, of these were Black. During this period of time, the average rate of pay was approximately the same for new hires, whether White or Black. From 1965 through May 29, 1972, there were 170 employee promotions at the defendant's plant. Ninety-five, or 55 percent, of these promotions went to black employees. The defendant attempts to promote current employees into higher level job classifications. However, the Company's opportunities to promote employees have been limited by the fact that its employees serve an average span of 17.4 years and the turnover rate is approximately two to four percent per year. This leads to a very stable work force. Moreover, total plant employment has declined 14 percent since July, 1965.

The defendant's executive vice-president, R. O. Sprague, issued a notice on June 29, 1965, to all the Company's supervisors announcing that it was the policy and intent of the Company to comply with the Act, 42 U.S.C. § 2000, and to give each applicant and employee the same consideration regardless of race, color, religion or national origin.

On January 1, 1968, the defendant voluntarily adopted an Affirmative Action Program, which it has maintained continuously since that date. Under the Affirmative Action Program defendant has utilized written descriptions for the various job classifications. It has also held numerous training classes for the employees to equip them to qualify for more difficult and higher paid positions. Since adoption of the program, black employees have received 62 percent of all promotions in the plant. And while the number of white supervisory employees has declined by one, the number of black supervisors has increased from one to eleven.

The foregoing indicates that the pre-Act pattern of segregated job classifications has been reduced by a significant extent through positive efforts by the defendant. The Court is convinced that the employer has willingly and conscientiously taken steps to eliminate pre-Act segregation practices.

In the presentation of his case, plaintiff has relied heavily upon statistics. See *United States* v. *Hayes*, 456 F.2d 112 (5 Cir. 1972). While black and white employees begin at the same rate of pay, Blacks ultimately fall behind the earning power of their white co-workers. Throughout the years from 1965 to 1971, the income gap between black and white employees at defendant's plant has widened. In 1965, the average wage for white employees was $105.86 per week, while Blacks averaged only $92.23 per week. In 1968, white employees of the Company averaged earning $126.60 per week while Blacks averaged only $104.84. In 1971, the defendant's white production employees earned an average weekly wage of $156.94 while Blacks earned only $134.13. Black employees in segregated job classifications in 1971 earned $27.05 less on the average than Whites working in all white jobs. In 1965, the gap was $20.20. A portion of the statistical data is attached as Appendices I, II, and III, indicating the representation of

black employees at various levels of the wage scale at relevant times. These data reflect that while defendant has recently achieved more dispersal of black employees into the higher wage levels, nevertheless the relative position of all black employees in comparison with the earnings of white employees has not improved. It is obvious that of the 95 black employees promoted from 1965 until the date of trial, only a few were promoted into formerly all-white or integrated job classifications. The majority of these promotees remained in segregated job classifications.

On the other hand, plaintiff has not proved discrimination against any specific individual to the Court's satisfaction. He called three of defendant's current employees as witnesses: his brother, Johnny Baxter, George Buckins and Summer Wallace. Each of these witnesses complained because a certain promotion had been granted to another Negro. None complained because a desired promotion was awarded to a white employee. Another witness, Frank King, who had voluntarily terminated his employment, had complained to the personnel counsellor that Blacks were not being promoted to the job of checker in the white sugar warehouse. After his complaint, a number of Blacks were promoted into the Checkers' jobs.

If the evidence discussed has appeared inconclusive, a clear answer may be found by looking at defendant's formal procedure for granting promotions. So far as appears from the evidence, defendant's job descriptions do not delineate qualifications; there is no system of posting notice of vacancies, and any information regarding job vacancies is disseminated through supervisory personnel. This naturally tends to channel and limit information regarding vacancies to those employees within segregated job classifications where such vacancies occur. One of the defendant's witnesses testified that employees become aware of all job vacancies by word of mouth within twenty-four hours. However, almost all promotions are granted without request from employees. Thus, rumor is not the kind

of effective notice needed to eliminate the consequences of pre-Act segregation practices.

The personnel manager testified that in granting promotions defendant considers the factors of qualifications and seniority and in each instance attempts to choose the employee best-qualified for the vacancy under consideration. If two or more employees are similarly qualified, the one with most seniority normally receives the promotion. Promotions are determined by consultation among the personnel manager, the plant superintendent and the employee's immediate and past supervisor. There are no written instructions or guidelines for supervisors pertaining to qualifications necessary for promotions. Under this system of judging qualifications, it is apparent that the supervisors' subjective evaluation of the employee's ability is an important factor in his advancement and an individual supervisor could, if he were so inclined, exercise racial discrimination in his selection of candidates for promotion. Promotion procedures which depend largely upon the subjective recommendation of the employee's supervisor are a ready mechanism for discrimination which may be concealed from management. *Rowe* v. *General Motors Corp.*, 457 F.2d 348 (5 Cir. 1972).

In accord with the decision in the *Rowe* case, *supra*, this Court finds that the defendant's promotion procedures violate Title VII in the following particulars:

1. The supervisor's recommendation is the most important factor in the promotion process.

2. Supervisors are not furnished written instructions specifying qualifications necessary for promotion.

3. The standards referred to in the testimony (work experience, desire for improvement, leadership potential, etc.) are vague and subjective.

4. Employees are not notified of promotion opportunities, nor are they notified of the qualifications necessary for promotion.

5. There are no safeguards in the procedure designed to avert discriminatory practices.

The Act imposes upon employers an affirmative duty to devise and implement pertinent *objective* criteria for determining which employees available for promotion are qualified to fill particular vacancies. *United States* v. *Terminal Co.*, 451 F.2d 418 at 453.

However, keeping in mind that the defendant's evidence establishes a positive effort to seek out and promote qualified personnel among its black employees, the finding of a violation of Title VII is bottomed on the following language of the Act: "It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees in any way which would . . . tend to deprive any individual of employment opportunities . . . because any individual of employment opportunities . . . because of such individual's race . . . ." 42 U.S.C. § 2000e-2(a)(2). In the absence of satisfactory proof of discrimination within the class, the Court does not find that the employer's promotion practices have, in fact, deprived the class within the prohibitions of 42 U.S.C. § 2000e-2(a)(1)—only that such practices *tend* to deprive the class of employment opportunities within the statutory prohibitions of 42 U.S.C. § 2000e-2(a)(2).

Allegations of plaintiff's petition charging other violations of Title VII are not supported by the evidence, which shows without conflict that restroom, locker and dining facilities at defendant's plant are used by all employees without regard to race.

Plaintiff's complaint mainly attacked defendant's system of promoting current employees. It did not aim specifically toward hiring practices, nor does the Court find from the evidence that there has been any racial discrimination by defendant in its system of hiring new employees.

THE ISSUE OF BACK PAY

The Court in its discretion will limit relief here to a decree prohibiting such future violations of the Act as have been pointed out above. It is deemed that two factors combine to make an award of back pay inappropriate. First, the defendant has acted in good faith and made a positive effort to eliminate pre-Act segregation practices. *Cf. Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8 Cir. 1970). Second, the plaintiff has failed to adduce satisfactory proof that such relief is needed to make the class whole. There has been no proof of a significant number of members of the group possessing qualifications who have been damaged by discriminatory practices notwithstanding their qualifications for promotion. Concerning the burden of proof, see generally *Dobbins* v. *Local 212, International Brotherhood of Electrical Workers*, 292 F. Supp. 413, 445-446. "Congress granted broad discretion to the District Court to fashion remedies in Title VII cases as the equities of the particular case compel." *LeBlanc* v. *Southern Bell Tel. & Tel. Co.*, — F.2d —, (No. 71-3402, 5 Cir. 1972), aff'ing. 333 F. Supp. 602 (E.D. La. 1971).

Additionally, the Court was impressed with the evidence that defendant's wage rates are higher than those of any other industry in the Savannah metropolitan area; its unbroken history of annual wage increases to all employees, without any discrimination; its policy, broken only during three depression years, of 15 percent annual bonus to all employees; its summer student employment program for employees' children, again without the slightest evidence of any discrimination; its policy of no layoffs when jobs were abolished by automation. In substance, the Court feels that the evidence supports the conclusion that the defendant was a poor target for this type action.

ATTORNEYS' FEES AND COSTS

One who succeeds in obtaining injunctive relief under Title VII should ordinarily recover attorneys' fees unless

special circumstances would render an award unjust. *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 402; 88 S.Ct. 964, 966; *Robinson* v. *Lorillard Corp.,* 444 F.2d 791 at 804. *Cf. Weeks* v. *Southern Bell Tel. & Tel. Co.,* — F.2d — (No. 72-1075, 5 Cir. 1972) and *Callahan* v. *Wallace,* — F.2d — (No. 71-3309, 5 Cir. 1972); 6 Moore's Federal Practice, pp. 1356-1357.

Plaintiff's attorneys have submitted evidence and affidavits to the Court concerning the time spent in the preparation and trial of the case. Based upon this evidence including that of experienced counsel for the defendant, and applying the guidelines set forth so concisely in *Clark* v. *American Marine Corp.,* 320 F. Supp. 709 (E.D. La. 1970), I will make an award of Twelve Thousand Five Hundred Dollars ($12,500) as attorney's fees for the plaintiff, together with Six Hundred Forty-seven Dollars and Sixty-five Cents ($647.65) expenses, in addition to otherwise allowable costs.

DECREE

The Savannah Sugar Refining Corporation, its officers, agents, employees, servants and all persons in active concert or participation with them, are hereby permanently enjoined and restrained from discriminating against the Negro employees of the defendant Savannah Sugar Refining Corporation at its refinery at Port Wentworth, Georgia, in violation of Title VII of the Civil Rights Act of 1964.

In particular, it is ORDERED and DECREED that defendant shall take certain affirmative action as hereinafter set forth, within ninety (90) days, to implement defendant's policy of equal employment opportunity at its refinery and to discharge defendant's obligations under law not to discriminate on the basis of race or color in the promotion of employees.

1. The defendant shall furnish supervisory personnel at its Port Wentworth refinery written instructions delin-

eating objective criteria and specific qualifications necessary for promotion or transfer of employees with respect to all job classifications in which vacancies occur.

2. The defendant shall post on bulletin boards in conspicuous places throughout all departments at its refinery notices of all job vacancies available for promotion or transfer of current employees. Said notices shall contain a specific job description for each vacancy, the rate of pay, and information with respect to the qualifications required and how and where application can be made.

3. The defendant shall place on bulletin boards in conspicuous places in all departments throughout its refinery notices containing information of training programs designed to equip employees with necessary skills for advancement. Said notices shall remain posted a reasonable length of time, shall particularize the benefits to be derived from the training and the qualifications required for entry into them, and shall specify how and where interested employees can make application to participate.

4. The defendant shall establish a committee, to consist of a reasonable number of management personnel, to insure that no employees shall be denied review or consideration for promotion or transfer at its refinery solely for the reason that he is not supported by the recommendation of his supervisor. Defendant shall continually keep posted in all departments at its refinery notices informing employees of the existence, availability and purpose of the review committee.

5. The defendant shall continue its current practice of giving qualifications paramount consideration in promoting employees.

6. The defendant shall continue to provide training programs to increase the skills and qualifications of its labor force and enable the employees to qualify for advancement and job transfers.

7. To implement the retention of supervision of this action the defendant shall make quarterly reports to the Court outlining its action in compliance with this decree. This report should include information concerning advancements and promotions, transfers, hirings, training programs and the job descriptions and qualifications referred to in paragraph three above.

JURISDICTION

The Court will retain jurisdiction of this cause for a period of two years. During such time, either party may by appropriate motion request modification of this order in light of new factual and legal developments.

It is so ordered, this 6th day of October, 1972.

/s/ ANTHONY A. ALAIMO
United States District Judge

APPENDIX I

Number of Employees, in all Job Classifications, by Race and hourly rate, and average weekly earnings by Race, Savannah Sugar Refining Corporation, July 2, 1965.

Number of Employees and Amount Earned

Hourly Rate	White	Amount Earned Per Week	Black	Amount Earned Per Week
3.66025	5	732.05		
3.2795	20	2623.60		
3.1845	6	764.28		
3.1075	4	497.20		
3.0225	1	121.90		
2.92	45	5256.00	5	584.00
2.86	4	457.60		
2.80	2	224.00		
2.77	12	1329.60		
2.745	2	219.60		
2.72	2	217.60		
2.68	6	643.20		
2.64	1	105.60		
2.637	3	316.44		
2.61	6	626.40		
2.60	3	312.00		
2.59	12	103.60	18	1864.80
2.583	1	103.32		
2.54	21	2133.60		
2.5195	10	1007.80		
2.50	3	300.00	1	100.00
2.48	1	99.20	7	694.40
2.47	3	296.40	1	98.80
2.46	2	196.80		
2.45	7	686.00	19	1862.00
2.44			1	97.60
2.43			26	2527.20
2.40			3	288.00
2.37			9	853.20
2.3675	1	94.70		
2.35			3	282.00
2.34			1	93.60
2.33	1	93.20	28	2609.60
2.28			119	10,852.80
2.12			78	6614.40
1.62	2	129.60		
Total	186	$19,690.39	319	$39,422.40

Average weekly income: White $105.86 Black $92.23

APPENDIX II

Number of Employees, in all Job Classifications, by Race and hourly rate, and average weekly earnings by Race, Savannah Sugar Refining Corporation, June 30, 1971

Number of Employees and Amount Earned

Hourly Rate	White	Amount Earned Per Week	Black	Amount Earned Per Week
4.0025	5	800.50		
3.6245	19	2754.62		
3.5295	6	847.08		
3.4525	3	414.30	2	276.20
3.45			1	138.00
3.41	1	136.40		
3.36	1	134.40		
3.32	4	531.20	1	132.80
3.24	48	6220.80	3	388.80
3.18	4	508.80		
3.16	1	126.40		
3.14	2	251.20		
3.10	4	496.00		
3.00	3	360.00		
2.99	7	837.20	5	598.00
2.95	5	590.00		
2.9425	6	706.20		
2.93	3	351.60		
2.92	9	1051.20	2	233.60
2.90	3	348.00		
2.893	1	115.72		
2.89	5	578.00	20	2312.00
2.86			1	114.40
2.85	7	798.00		
2.84			5	568.00
2.8295	8	905.44		
2.81			1	112.40
2.80	3	336.00		
2.76	2	220.80	20	2208.00
2.75			6	660.00
2.74			1	109.60
2.71			9	975.60
2.70			3	756.00
2.6675	1	106.70		
2.63	2	210.40	60	6312.00
2.60			6	624.00
2.58			87	8978.40
2.41			77	7422.80
1.90	2	152.00		
Totals	165	$20,888.96	314	$32,920.60

Average weekly income: White $126.60 Black $104.84

APPENDIX III

Number of Employees, in all Job Classifications, by Race and hourly rate, and average weekly earnings by Race, Savannah Sugar Refining Corporation, July 2, 1968

Number of Employees and Amount Earned

Hourly Rate	White	Amount Earned Per Week	Black	Amount Earned Per Week
4.81	7	1346.80		
4.40	16	2816.00		
4.30	5	860.00	1	172.00
4.23	5	846.00	1	169.20
4.22	1	168.80		
4.09	1	163.60		
4.08	4	652.80	1	163.20
4.00	2	320.00	2	320.00
3.97	48	7622.40	5	794.00
3.96	11	1742.40	12	1900.80
3.85	1	154.00		
3.82	2	305.60		
3.81	3	457.20		
3.76	1	150.40		
3.73	2	298.40		
3.67			1	146.80
3.66	7	1024.80		
3.64	3	436.80	1	145.60
3.63	6	871.20	5	726.00
3.61	2	288.80		
3.60			5	720.00
3.56	11	1566.40		
3.53	5	706.00	2	282.40
3.51	2	280.80	14	1965.00
3.50	4	560.00	1	140.00
3.49	5	698.00	1	139.60
3.46	2	276.80	17	2352.00
3.45			9	1242.00
3.44			4	550.40
3.41			4	545.60
3.40			3	408.00
3.38			2	270.40
3.37	1	134.80	2	269.60
3.32	1	132.80	47	6241.00
3.27	2	261.60	70	9156.00
3.09	1	123.60	62	7663.20
Totals	161	$25,266.80	272	$36,482.80

Average weekly income: White $156.94 Black $134.13

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-1039

D. C. Docket No. CA 2304

Appeal from the United States District Court for the Southern District of Georgia

Before: BROWN, Chief Judge, and GEWIN and GOLDBERG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

June 6, 1974

Issued as Mandate:

No. 73-1039.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

June 6, 1974.

OPINION

Class action was brought against employer to recover for alleged employment discrimination in violation of the Civil Rights Act of 1964. The United States District Court for the Southern District of Georgia, 350 F.Supp. 139, Anthony A. Alaimo, J., entered judgment which declared that the employer was in violation of the Civil Rights Act but which denied classwide back pay. The plaintiff employee appealed. The Court of Appeals, Gewin, Circuit Judge, held that the alleged good-faith actions of the employer taken subsequent to the filing of lawsuit was not a defense and did not provide proper basis for denial of classwide back pay and that evidence supported the finding that the plaintiff employee was not qualified for promotion to relief boiler room operator. The Court further set aside the award of attorney's fees to permit determination of adequate compensation.

Affirmed in part; reversed in part and remanded.

1. Civil Rights 9.10

A promotional system dependent upon supervisory recommendation uncontrolled by clearly delineated and objective job criteria and which results in discriminatory job standards is patently illegal under Title VII of the Civil Rights Act of 1964 which forbids private racial discrimination in employment. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Civil Rights 44(4)

Evidence supported trial court's finding that blacks, as a class, were the victims of discriminatory employment prac-

tices in that an overriding determinant for job advancement at employer's sugar refinery was the race or color of the employee. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

3. Civil Rights 9.10

Relevant standing of defendant employer's employment practices in comparison with other industries in the area was not determinative of employee's claim of racial discrimination in employment. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

4. Civil Rights 39

Good faith on part of employer in taking action to vitiate the effects of its past practice of employment discrimination is not a defense to an action for classwide back pay when the class has established a prima facie case of discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

5. Civil Rights 46

Where economic loss to black employees had occurred in the past and discrimination continued which resulted in financial deprivation to the class of black employees, the class was entitled to back pay notwithstanding any actions taken in good faith by the employer to dissipate its previous discriminatory conduct. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

6. Civil Rights 9.10

In litigation under the provisions of the Civil Rights Act of 1964 which forbid racial discrimination in employment, neither benign neglect nor activism will be judicially tolerated if the outcome of such practices is racially discriminatory and results in monetary loss to the discrimi-

natees. Civil Rights Act of 1963, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

7. Civil Rights 43

Where employee had established a prima facie case of classwide racial discrimination which resulted in severe economic disparities between the earning power of white and black employees at employer's sugar refinery and there was evidence of a promotion system which confined black employees to low paying jobs, there was strong presumption that number of individual members of the class would have received promotions to better paying white positions if promotion had been based on merit. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981; Fed. Rules Civ. Proc. rule 23, 28 U.S.C.A.

8. Civil Rights 43, 45

In an action brought under Title VII of the Civil Rights Act of 1964 which forbids racial discrimination in employment, it is incumbent on the class to establish that an employer's employment practices have resulted in cognizable deprivations to it as a class; once the class does establish invidious treatment, the court should then properly resolve whether a particular employee is in fact a member of the covered class, has suffered financial loss, and thus is entitled to back pay or other appropriate relief. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. Civil Rights 45

Where employer had no clearly ascertainable promotion job standard other than "best qualified" criterion, the district court would be required to ascertain what job-related qualifications the white employees possess who occupy the higher paying white classifications in order to determine the entitlement to back pay of an individual member of class of discriminatees. Civil Rights Act of 1964, § 701

et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981; Fed.Rules Civ.Proc. rule 23(b)(2), 28 U.S.C.A.

10. Civil Rights 43, 44(4)

Initial burden is on individual discriminatee to show that he was available for promotion and possessed the general characteristics and qualifications which are shown by employer to be possessed by higher paid white employees and are job related; once this burden is met, the employer must demonstrate by clear and convincing evidence that any particular employee would never have been advanced because of that individual's particular lack of qualifications for more difficult position, or for other good and sufficient reasons such employee would never have been promoted in order to preclude recovery of back pay by that individual. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981; Fed.Rules Civ.Proc. rule 23(b)(2), 28 U.S.C.A.

11. Civil Rights 43

Any substantial doubts as to whether any particular member of class of discriminatees would have been advanced under a color-blind promotion system must be resolved in favor of the discriminatee who has produced evidence to establish a prima facie case. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981; Fed. Rules Civ.Proc. rule 23(b)(2), 28 U.S.C.A.

12. Courts 406.3(13)

Findings of fact in equal employment opportunity cases will not be set aside unless they are clearly erroneous. Civil Rights Act of 1964, § 701et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

13. Civil Rights 44(4)

Substantial evidence supported trial court's finding that individual discriminatee was not promoted to the position

of relief boiler room operator because he was not qualified to perform the duties required by that higher paying job rather than because of his race. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

14. Civil Rights 46

An award of attorney's fees in an equal employment opportunity case is within the sound discretion of the trial judge. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

15. Courts 406.9(10)

In view of necessity to remand equal employment opportunity case for further proceedings by district court, award of attorney's fees would be set aside with directions that a determination of adequate compensation be made in an amount sufficient to insure that attorneys will undertake representation in such cases in order to vindicate public rights. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Appeal from the United States District Court for the Southern District of Georgia.

Before BROWN, Chief Judge, and GEWIN and GOLDBERG, Circuit Judges.

GEWIN, Circuit Judge:

This appeal emanates from the district court's judgment granting appellant Baxter and the class he represents partial injunctive relief prohibiting Savannah Sugar Refining Corporation's (hereinafter Savannah) discriminatory promotion practices.[1] Baxter based his right to affirmative relief on Title VII of the Civil Rights Act of 1964, 42 U.S.C.

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[1] *See* 350 F.Supp. 139 (S.D.Ga. 1972). Savannah has not cross-appealed from the injunctive relief granted below.

§ 2000e et seq., and 42 U.S.C. 1981 which forbid private racial discrimination in employment.[2] In the district court's opinion rendered on October 6, 1972, Baxter was permitted to represent all black employees at Savannah's refinery pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

Baxter presents three contentions for our review. First, it is alleged that the district court erred in denying his request for class-wide back pay on the asserted grounds of Savannah's alleged good faith actions taken subsequent to the filing of this lawsuit and additionally because Baxter had failed to prove that an award of back pay was necessary to make whole the class which had been subject to discrimination. Secondly, he contends that the district court erred in holding that he was not the victim of Savannah's discriminatory employment practices. Finally, Baxter asseverates that the lower court unduly limited, without apparent justification, its award of attorney's fees granted to Baxter's counsel. After a review of the facts disclosed by the record and applying the applicable employment discrimination principles to the facts, we conclude that Baxter's first and third contentions are meritorious. Accordingly, we remand this case to the district court for further proceedings consistent with this opinion.

I

Savannah, a New York corporation, refines, distributes and sells cane sugar. It maintains its headquarters in Savannah, Georgia. Baxter and the class he represents are employed at Savannah's principal refinery in Port Wentworth, north of Savannah. Savannah has a history of hiring a large percentage of black employees at its refinery. Indeed, at all times relevant to this case, a majority of the workers at the refinery has been black. Baxter does not complain of the percentage of blacks hired at the refinery,

[2] Sanders v. Dobbs Houses, 431 F.2d 1097 (5th Cir. 1971).

but he does challenge its promotional policies toward black employees subsequent to their employment.

Savannah's refinery is divided into numerous functional departments. In turn, the various departments are further compartmentalized into many job classifications. Even though lines of progression do exist within the departments, transfers freely occur among them. Furthermore, promotions are not based strictly on considerations of seniority but more importantly promotions are granted or denied almost entirely upon a department supervisor's recommendations as to who is "best qualified" among those in the pool of potential promotees for the particular job involved.

[1] The facts fully support Baxter's claim that Savannah has had a history—which has continued to the present time—of confining black employees to lower-paying, less-skilled positions within the refinery. The record demonstrates a classic example of consistent and continuous employment practices that have the impermissible consequence of limiting upward mobility of blacks seeking economic advancement through job promotions. In a rather paternalistic manner, Savannah confers, without prior notice, promotions within the refinery. The supervisors, who are almost all white, choose those employees whom they feel have the qualities and backgrounds needed for an open position. There are no objective job descriptions to aid or guide supervisors in their promotion selection. Without notice of job openings and the qualifications desired, blacks are totally dependent upon their white superiors for promotion and economic advancement.[3]

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[3] There can be no question about the impropriety of a promotional system dependent upon supervisory recommendations uncontrolled by clearly delineated and objective job criteria where the discriminatees have demonstrated a conclusive case of discriminatory job standards. Such a system is patently illegal under Title VII See Pettway v. American Cast Iron Pipe Co., — F.2d —, pp. —, —— (5th Cir. 1974) [No. 73-1163, April 29, 1974] pp. 3244, 3298-3303.

There is little dispute about the deleterious impact on black employees of Savannah's promotion system prior to the filing of Baxter's lawsuit in 1968. In 1965, Savannah's work force was divided into seventy job classifications of which sixty-seven classifications were segregated by race. During the period 1965 to 1968, blacks continued to be assigned to all black positions and when promoted, were advanced to higher positions traditionally held by blacks. Therefore, at least until 1968, the company made no attempt to remove its discriminatory employment policies and conform to the Act's proscriptions.

In early 1968, Savannah adopted a so-called "affirmative action program" in an apparent effort to alleviate its quondam misdeeds against blacks and possibly to blunt the impact of Baxter's lawsuit. Under this "program", blacks began receiving promotions to historically higher jobs held by blacks. Thus, during the period of 1968 through 1971, Savannah elevated 131 employees to higher positions of which 81 were black. The record establishes however, that most blacks were advanced to positions traditionally held by blacks. Moreover, it was not until 1971 that a black employee was promoted to a supervisory position which entailed direction of white employees. The refinery, on the other hand, did not undertake to improve its promotion practices by providing for objective guidelines and job descriptions which hopefully would have eradicated the subjectivity that had characterized its policies in the past.

The district court seems to have accorded some significance to the fact that the size of the refinery's work force had diminished in analyzing Savannah's promotion system and its impact on black employees.[4] Such a consideration, while perhaps germane where a discriminatee's challenge is to an employer's hiring practices, is of small

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[4] 350 F.Supp. at 144.

relevance where the challenge is to an employer's promotion policies and the observed reduction in the work force occurs primarily in the lower paying black positions as in the instant case.[5] During a part of the relevant period under review here, the work force actually increased between 1965 through 1968 from 505 employees to 510. Although there was a decrease between 1968 to 1971, the evidence demonstrates that while only four positions held by whites were eliminated from the work force, over 42 positions held by blacks were terminated. Thus the reduction in the size of the work force can not account, in any significant manner, for the black employees' position at the refinery.

The trial court aptly observed the discriminatory consequence of Savannah's promotion policies. It stated:

> While black and white employees begin at the same rate of pay, Blacks ultimately fall behind the earning power of their white co-workers. Throughout the years from 1965 to 1971, the income gap between black and white employees at defendant's plant has widened. In 1965, the average wage for white employees was $105.86 per week, while Blacks averaged only $92.23 per week. In 1968, white employees of the Company averaged earning $126.60 per week while Blacks averaged only $104.84. In 1971, the defendant's white production employees earned an average weekly wage of $156.94 while Blacks earned only $134.13. Black employees in segregated job classifications in 1971 earned 27.05 less on the average than Whites working in all white jobs. In 1965, the gap was $20.20. . . . These data reflect that while defendant has recently achieved more dispersal of black employees into the higher wage levels, nevertheless the relative position of all black employees . . . has not improved. *It is obvious that of the 95 black employees promoted from 1965 until the date of trial, only a few were promoted into formerly all-white or integrated job classifications.*

[5] *See* United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971).

The majority of these promotees remained in segregated job classifications.[6]

The district court had no difficulty in discerning the cause of the difficulties of the black employees in the refinery. Savannah did not give notice of vacancies, job descriptions or qualifications desired for a higher position. Employees were selected for promotion by supervisors on the basis of those determined to be "best qualified." Accordingly, the court enjoined the use of supervisory recommendations as the criteria for promotion and required that detailed affirmative steps be taken to eliminate such past abuses.

[2] We completely agree with the district court order requiring that affirmative steps be taken to eliminate Savannah's past discrimination in promotions. The record clearly demonstrates the injurious consequences of the employer's policies on black employees. Only one conclusion can be distilled from the evidence; blacks, as a class, were the victims of discriminatory employment practices forbidden by Title VII and § 1981. An overriding determinant for job advancement at the refinery was the race or color of the employees. With the factual backdrop enunciated, we proceed to discuss Baxter's contentions.

II

[3] The district court explicated two reasons for its denial of class-wide back pay. First, the court was impressed by the fact that Savannah had "acted in good faith and made a positive effort to eliminate pre-Act segregations practices."[7] Secondly, the court held that Baxter

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[6] 350 F.Supp. at 144-145. (Emphasis added).

[7] 350 F.Supp. at 146. Additionally, the court recited various observations about the relevant standing of the refinery's employment practices in comparison with other industries in the area. *Id.* However laudatory these practices and accomplishments may be, we do not consider them determinative of Baxter's claim of employment discrimination.

had "failed to adduce satisfactory proof that such relief is needed to make the class whole. There has been no proof of a significant number of members of the group possessing qualifications who had been damaged by discriminatory practices notwithstanding their qualifications for promotion."[8] It is our considered opinion that neither of the stated grounds is legally sufficient to support the denial of a back pay award under the facts disclosed by the record in this case.

[4-6] It is now settled law in our circuit that good faith is not a defense to an action for class-wide back pay. In Johnson v. Goodyear Tire & Rubber Company,[9] this court held that an employer's allegedly good faith actions taken to vitiate the effects of its past practice of employment discrimination are not a defense to a claim for back pay when the class has established a prima facie case of discrimination. In reviewing the claim of good faith asserted by the employer, Goodyear, in *Johnson*, we observed:

> First, Goodyear argues that it would be unjust to impose back pay upon it since the district court found that it has proceeded at all times subsequent to the Act to remedy its past discriminatory practices. Johnson strongly contests this finding of the court. We find it unnecessary to resolve this factual controversy since we hold as a matter of law that such a finding is totally irrelevant as a defense to a claim for back pay.
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> Goodyear's argument completely misconstrues the nature of a back pay award. The entire thrust of this contention is based on the premise that back pay is punishment for its misdeeds and thus the court in good conscience should consider the motive of the employer in imposing the "penalty." This proposition has been totally rejected by our court. . . . Our Cir-

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[8] *Id.* at 146.

[9] 491 F.2d 1364 (5th Cir. 1974). The district court did not have the benefit of the holding in *Johnson* when it rendered its opinion.

> cuit has been steadfast in its determination to insure that sufficient affirmative relief be provided to vindicate the rights guaranteed by Title VII. In short, back pay awards [seek not] to punish the employer but to economically elevate the victims to the status which is rightfully theirs.[10]

The *Johnson* holding is equally applicable to the instant case. Even assuming that Savannah has taken actions in good faith to dissipate its previous discriminatory conduct, such actions are of little consequence where, as the instant case reveals, economic loss has occurred in the past and discrimination presently continues which results in financial deprivation to a company's black employees. Whether an employer is beneficient or malevolent in implementing its employment practices, the same prohibited result adheres if they are discriminatory; economic loss for the class of discriminatees. In Title VII litigation, neither benign neglect nor activism will be judicially tolerated if the outcome of such practices is racially discriminatory and results in monetary loss.

[7] Concerning the burden of proof imposed on the class of discriminatees, we think the district court acted prematurely in requiring individual proof of economic loss and committed error in mandating that an individual establish that he had the prerequisite "qualifications" for a higher position in the initial proceedings to ascertain the nature of employment practices. We reiterate, as the district court apparently recognized, that Baxter has established a prima facie case of class-wide discrimination resulting in severe economic disparities between the earning power of white and black employees at the refinery. Moreover, the evidence clearly evinced a promotion system which confined black employees to low paying black job classifications.

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[10] 491 F.2d 1364, 1376 (footnotes omitted). *See also* Pettway v. American Cast Iron Pipe Co., — F.2d —, pp. —, —— (5th Cir. 1974) [No. 73-1163, April 29, 1974] pp. 3244, 3317-3341.

In addition, even when promotions were given to blacks they were limited substantially to higher paying jobs formerly held by blacks. Therefore, there is a strong presumption that a number of the individual members of the class would have received promotions to better paying white positions if Savannah's promotion process had been based on merit.[11]

[8] A Title VII class action suit presents a bifurcated burden of proof problem. Initially, it is incumbent on the *class* to establish that an employer's employment practices have resulted in cognizable deprivations to it as a class. At that juncture of the litigation, it is unnecessarily complicating and cumbersome to compel any particular discriminatee to prove class coverage by showing personal monetary loss. What is necessary to establish liability is evidence that the *class* of black employees has suffered from the policies and practices of the particular employer. Assuming that the class does establish invidious treatment, the court should then properly proceed to resolve whether a particular employee is in fact a member of the covered class, has suffered financial loss, and thus entitled to back pay or other appropriate relief.

As a further justification for denying back pay relief, the trial court also concluded that no member of the class had shown that he possessed the qualifications for a promotion. On the basis of this record, we find it difficult to discern just what qualifications the district court had in mind. Baxter's evidence demonstrated that promotions resulted only from supervisory recommendations based on esoteric standards never revealed to the discriminatees. It is hard to conceive how one can prove that he meets certain employment criteria when no standards have been delineated by the employer. It is obvious that the burden

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[11] *Compare* United States v. Jacksonville Terminal Co., 451 F.2d 418, 441 (5th Cir. 1971).

of proof, encompassing nebulous and indeterminate standards, was improperly imposed here.

[9] Accordingly, it is now proper to proceed with individual determinations of class coverage to resolve the issue of personal economic loss. The *Johnson* case, *supra*, refers to many factors which must be considered in the complex determination of an individual's entitlement to back pay.[12] Unlike the *Johnson* case, however, Savannah has no clearly ascertainable job standards other than the equivocal "best qualified" criterion. Thus it may be appropriate for the court on remand to ascertain what qualifications the white employees possess who occupy the higher paying "white" classifications. Of course, only those qualifications possessed by white workers which are established by Savannah to be job related should be considered. The evidence distilled from this process should provide a standard for determining whether an individual black worker was actually qualified for promotion under a true merit system. We do not purport to constrain the inquiry of the district court or to confine its consideration of other pertinent factors, if any, which may be developed by the evidence.

Obviously many factors will have to be considered in resolving which individual employees would have been promoted. There are 272 black employees at Savannah's plant. Each individual presents unique characteristics and qualities. Perhaps of some significance is the fact that although higher positions do become available at the refinery, it does have a lower turnover rate than is usually found in an industrial setting. Thus it is apparent that many black employees would have never received an advancement regardless of Savannah's policies. If this assumption is established as a fact by Savannah, then the

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[12] Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1379-1380 (5th Cir. 1974).

district court might consider a black incumbent's accumulated seniority in determining which black employee would have been promoted from the available pool. While this tentative proposal is only meant as a suggestion, it does indicate the type of analysis which will be required to attain an equitable result from the factual milieu presented here.[18]

[10, 11] Hopefully through such analysis, it will be possible to determine which blacks would have been promoted under a racially neutral system based on merit and job qualifications. As previously noted, the entire system of promotions formerly utilized by the refinery was based on a supervisor's subjective judgment without the benefit of objective job descriptions. We think such a factual situation lends itself to the analysis concerning the burden of proof explicated in the *Johnson* opinion. Accordingly, on remand the initial burden will be on the individual discriminatee to show that he was available for promotion and possessed the general characteristics and qualifications which are shown by Savannah to be possessed by the higher paid white employees and are job related. Once this burden is met, the employer must demonstrate by clear and convincing evidence that any particular employee would have never been advanced because of that individual's particular lack of qualifications for a more difficult position or for other good and sufficient reasons such employee would never have been promoted. It is apparent that whether any particular individual would have been advanced under a color-blind system cannot now be determined with 100% certainty. The court on remand will have to deal with probabilities. Any substantial doubts created by this task must be resolved in favor of the discriminatee who has produced evidence to establish a prima facie case. The discriminatee is the innocent party in these circumstances.

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[18] For further suggestions which may possibly aid the parties on remand, *see* Davidson, "Back Pay" Awards Under Title VII of the Civil Rights Act of 1964, 26 Rutgers L.Rev. 741 (1973).

III

[12, 13] Next, we are confronted with the issue of whether the district court erred in holding that Baxter was not promoted to the position of (relief) boiler room operator because he was not qualified to perform the duties required by that higher paying job. Our standard of review for resolving this alleged error has been adequately enunciated:

> We review findings of fact in Title VII cases in the same manner as other fact findings of the trial court are reviewed. This Court may not set them aside unless it is able to conclude that such findings are "clearly erroneous." [14]

It is not our function to reverse a trial court's determination of the facts unless we can conclude that there are insufficient facts in the record to support its ultimate conclusions. A review of this record demonstrates that sufficient evidence was introduced from which the trial court could infer that Baxter was not qualified to participate in the training program leading to the position of boiler room operator (relief).

Baxter has been employed as an electrician's helper in the refinery's electric shop since July 1, 1957. On September 7, 1959, he was assigned added duties as a relief helper in the refinery's boiler room. The boiler room is the heart of Savannah's sugar refining operation. It generates the vital energies necessary for the sugar production process. Because of its critical function, Savannah is required to operate the boiler room generators on a 24-hour, seven-day-week basis. To provide for this extended operation, it is necessary to have relief workers who can replace the regular boiler room employees on weekends and during emergency situations.

There are two positions in the boiler room; operator (or foreman) and helper. Concomitantly, two relief positions

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[14] Smith v. Delta Airlines, Inc., 486 F.2d 512, 514 (5th Cir. 1973).

are also needed. The district court noted the complex tasks which must be performed by an operator. This observation is fully supported by the record. Indeed, Savannah requires a six-month training program for the new operators in the boiler room. The court further found that the position of helper did not prepare one to assume the duties of operator because each position required substantially different skills.

The trial court further concluded that a mechanical background was necessary to assume the job of boiler room operator and that the men advanced to that position "were significantly better qualified and possessed superior mechanical backgrounds than [Baxter] for the job of foreman or relief foreman in the boiler room."[15] Significance was additionally placed on the fact that Baxter had received some unfavorable work ratings from his supervisors for infractions of company rules and for failure to adequately perform his duties.[16]

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[15] 350 F.Supp. at 143.

[16] Specifically the court found:

> The plaintiff has been given written warnings on four occasions for failure to perform his work properly and for violation of plant rules. He has an unfavorable personnel record and what is considered a bad attitude toward his work, as evidenced by the testimony of numerous witnesses and his demeanor in the courtroom. He has been given the opportunity on three different occasions to transfer into the boiler room as a regular helper, but has refused the transfer on each occasion. Moreover, plaintiff does not have a mechanical background as do all the four men promoted to the position of boiler room foreman or trained as relief foreman since the effective date of the Act. Each of those promoted had significantly better qualifications than plaintiff. The Court finds that the defendant has not discriminated against the individual plaintiff because of his race in failing to promote him to the position of boiler room foreman or relief foreman.

350 F.Supp. at 143.

In 1965, following the enactment of Title VII, Baxter requested a promotion to the relief operator's position from his current job as relief helper. In contravention of Baxter's request, the company promoted Joseph Brinson, a white employee, to the position of relief operator in November of that year. The company justified Brinson's appointment on the ground that he had superior educational and mechanical background compared to the other prospective promotees.[17] In December of 1965, the company assigned John Andrews, a white, to the position of relief operator (trainee). On January 1, 1966, Savannah promoted Euless Hodges, a white, to the regular operator's position. Hodges had performed for several years as relief operator prior to his appointment. Thereafter, Baxter filed his charge with the EEOC. Subsequently, the company assigned another white, Dennis Holiday to be a relief operator in April of 1967. Finally, in June of 1968, following the institution of this suit, Savannah assigned the first black man, Frank Williams, to the position of relief operator. The evidence shows that with the exception of Williams, all relief operators and regular operators have been white. All the helpers have been black.

In considering the treatment accorded Baxter by the company, we cannot ignore Savannah's history of racial discrimination and thus must review the actions taken against Baxter within this context. Furthermore, it is apparent that the company did not welcome Baxter's suit. In fact, the record shows that little concrete action was taken to remove the past discriminatory practices until Baxter's suit was filed. We can only conclude that this suit was the partial impetus for the company's various affirmative actions and could have possibly colored some of the negative ones taken against Baxter.

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[17] The record does not show Brinson's educational attainment but it does reveal that Brinson had formerly been a packaging department mechanic. In June of 1966, Brinson was given the regular operator's position.

It is apparent from Baxter's testimony at trial, that his real grievance was that the company allegedly discriminated against him in not granting him the right to participate in the operator's training program. He readily admitted that he did not possess the skills necessary to perform the operator's jobs. However, his admission was based on the fact that he was never permitted to gain these skills from the training program which is required of all operators.

The primary justification for excluding Baxter from the training program was his lack of a mechanical background and poor attitude evidenced by various infractions of company rules. Pretermitting the issue of Baxter's attitude and work record following the institution of this suit, the evidence does support the trial court's conclusions that mechanical expertise and skills are a necessary job trait and qualification for the performance of the duties of relief operator in the boiler room. Those employees who have performed the duties of operator in the best and most efficient manner have possessed a mechanical background. Mechanical expertise is necessary to respond intelligently to the demands of the boiler room. The record reveals that Baxter had not gained this needed skill in his position as an electrician's helper and therefore could be properly excluded from consideration as a relief operator. Of course, our holding does not preclude proof from other blacks who do possess a mechanical background and other appropriate qualifications from proving that they were the victims of discrimination in being excluded from this predominantly all-white position on remand. Accordingly, that part of the trial court's judgment denying relief to Baxter is affirmed.[17a]

[17a] We wish to make clear the fact that our holding today as to the claim of Baxter with respect to the position of (relief) boiler room operator relates only to that position. If he is able to establish promotional discrimination in any other area of his employment, he may do so in accordance with the standards outlined in this opinion.

IV

In view of the fact that it is necessary to remand this case for further proceedings by the district court, we deem it appropriate to set aside the award of attorney's fees made at trial in order to allow further consideration of that subject in the district court. The district court awarded $12,500 in attorney's fees to the four participating attorneys who represented Baxter in various stages of the litigation in the district court. The four attorneys claimed that they had expended over 420 hours of time in preparing and trying the instant case. Thus the award of $12,500 amounts to an average remuneration of approximately $22.50 an hour.

[14] First, there appears to be no dispute as to the number of hours which were spent by counsel on Baxter's behalf. There is a suggestion that some of the work performed by counsel for Baxter was duplicitous because of a change in counsel during the preparation stages of the litigation. Other grounds are presented by Savannah to support the award. However, we have no way of knowing the underlying reason for limiting the award to $12,500 since the district court gave none. We are aware of the rule that an award of attorneys' fees is left to the sound discretion of the trial judge.[18] The silence of the district court prevents us from determining whether there was a proper exercise of discretion in the instant case.

[15] It is obvious that additional work will be required of counsel upon remand. We believe a determination of adequate compensation should be made by the district court when the case is finally concluded. If conditions warrant, an interim award may be granted. There is evidence in the record which tends to support the claim that the award of $22.50 per hour is low.

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[18] Weeks v. Southern Bell Telephone & Telegraph Co., 467 F.2d 95, 97 (5th Cir. 1972).

Many equitable considerations are involved in awarding attorney's fees in a Title VII suit and for that reason we will not undertake to fix a rate of compensation in this opinion.[19] The district court should have before it information as to charges generally made by counsel for litigants in this type of controversy in the Southern District of Georgia. We would not suggest that the highest or the lowest rate should be awarded. Due to the nature of public rights being vindicated, the award should be in such an amount to insure that attorneys will undertake representation in this type of case.[20]

Affirmed in part and reversed and remanded in part for further proceedings consistent with this opinion.

Affirmed in part and reversed and remanded in part.

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[19] For an exhaustive list of the factors which a district court in the Fifth Circuit should consider in awarding attorneys' fees, *see* Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

[20] *See* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1039

ON PETITION FOR REHEARING

(Filed July 9, 1974)

Before Ch. J. Brown, Hons. Gewin & Goldberg, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

CIVIL RIGHTS ACT OF 1964 AS AMENDED

AN ACT To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

* * * * * * * *

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY [1]

DEFINITIONS

SEC. 701. For the purposes of this title—

(a) The term "person" includes one or more individuals, *governments, governmental agencies, political subdivisions,*

[1] Includes 1972 amendments made by P.L. 92-261 printed in italic.

labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has *fifteen* or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or *any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or* (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, *except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972,* persons having fewer than *twenty-five* employees (and their agents) shall not be considered *employers.*

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any confer-

ence, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) *twenty-five* or more during the first year after the *date of enactment of the Equal Employment Opportunity Act of 1972, or* (*B*) *fifteen* or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, *except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.*

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, *and further includes any governmental industry, business, or activity.*

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal

Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) *The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's, religious observance or practice without undue hardship on the conduct of the employer's business.*

EXEMPTION

SEC. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, *educational institution,* or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, *educational institution,* or society of its *activities.*

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, *or applicants for membership* or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an

employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion of such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

() Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual

for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of

the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, *or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership,

because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment *agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment *agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee* indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. *Members of the Commission* shall be appointed by the President by and with the advice and consent of the *Senate* for a term of five *years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for*

more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and *except as provided in subsection (b),* shall appoint, in accordance with the *provisions of title 5, United States Code, governing appointments in the competitive service, such officers, agents, attorneys, hearing examiners, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: Provided, That assignment, removal, and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code.*

(b)(1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 706 and 707 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attor-

ney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this title.

(*c*) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(*d*) The Commission shall have an official seal which shall be judicially noticed.

(*e*) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(*f*) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this title.

(*g*) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to *intervene* in a civil action brought *under section 706* by an aggrieved party *against a respondent other than a government, governmental agency, or political subdivision.*

(*h*) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(*i*) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 9 of the Act of August 2, 1939, as amended (the Hatch Act), notwithstanding any exemption contained in such section.

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. *(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.*

(*b*) Whenever *a charge is filed by or on behalf of a* person claiming to be aggrieved, or by a member of the Commission, *alleging* that an employer, employment agency, labor *organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* has engaged in an

unlawful employment practice, the Commission shall *serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on* such employer, employment agency, labor *organization, or joint labor-management committee* (hereinafter referred to as the "respondent") *within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges* shall not be made public by the Commission. If the Commission *determines* after such investigation that there is *not* reasonable cause to believe that the charge is true, *it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true,* the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such *informal* endeavors may be made public by the *Commission, its officers or employees, or used as evidence in a subsequent proceeding* without the written consent of the *persons concerned.* Any *person* who *makes* public information in violation of this subsection shall be fined not more than $1,000 or imprisoned *for* not more than one *year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) from the date upon which the Commission is authorized to take action with respect to the charge.*

(*c*) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(*d*) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective *date* of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(*e*) A charge under *this section* shall be filed within *one hundred and eighty* days after the alleged unlawful employment practice *occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter,* except that in *a* case of an unlawful employment practice with respect to which the person aggrieved has *initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof,* such charge shall be filed by *or on behalf of* the person aggrieved within *three hundred* days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(*f*)(*1*) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection *(c) or (d),* the Commission has been unable to *secure from the respondent a conciliation agreement acceptable to the Commission,* the Commission *may bring a civil action against any respondent not a government, government agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental*

agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has notified a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the *Commission,* or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action *upon certification* that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections *(c) or (d) of this section or further* efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attor-

ney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issued has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101-115), shall not

apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under *this section*, the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under *this section* and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

SEC. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted

pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest

practicable date and to cause the case to be in every way expedited.

(c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9, of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to the date of enactment of the Equal Employqment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

EFFECT ON STATE LAWS

SEC. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or

punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

SEC. 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, *engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and* utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, *pay by advance or reimbursement* such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no

longer serves the interest of effctive enforcement of this title.

(c) *Every* employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and *to* furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, *and, if such application for an exemption is denied,* bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. *If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States*

district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this section.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

INVESTIGATORY POWERS

SEC. *710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized*

agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply.

NOTICES TO BE POSTED

SEC. 711. (a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS' PREFERENCE

SEC. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

RULES AND REGULATIONS

SEC. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under the section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the

Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

FORCIBLY RESISTING THE COMMISSION OR ITS REPRESENTATIVES

SEC. 714. The provisions of *sections 111 and 1114* title 18, United States Code, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. *Notwithstanding the provisions of sections 111 and 1114 of title 18, United States Code, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life.*

EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL

SEC. 715. *There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates. The Council shall have the responsibility for developing and implementing*

agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

EFFECTIVE DATE

SEC. 716. (a) This title shall become effective one year after the date of its enactment.

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become immediately.

(c) The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this title to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this title when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 717. *(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.*

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment oppor-

tunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department,

agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

SPECIAL PROVISIONS WITH RESPECT TO DENIAL, TERMINATION, AND SUSPENSION OF GOVERNMENT CONTRACTS

Sec. 718. No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections: Provided, That

if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

PROVISIONS OF EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 WHICH RELATE TO BUT DO NOT AMEND THE CIVIL RIGHTS ACT OF 1964

Sec. 9. (a) Section 5314 of title 5 of the United States Code is amended by adding at the end thereof the following new clause:

"(58) Chairman, Equal Employment Opportunity Commission."

(b) Clause (72) of section 5315 of such title is amended to read as follows:

"(72) Members, Equal Employment Opportunity Commission (4)."

(c) Clause (111) of section 5316 of such title is repealed.

(d) Section 5316 of such title is amended by adding at the end thereof the following new clause:

"(131) General Counsel of the Equal Employment Opportunity Commission."

Sec. 12. Section 5108(c) of title 5, United States Code, is amended by—

(1) striking out the word "and" at the end of paragraph (9);

(2) striking out the period at the end of paragraph (10) and inserting in lieu thereof a semicolon and the word "and"; and

(3) by adding immediately after paragraph (10) the last time is appears therein in the following new paragraph:

"(11) the Chairman of the Equal Employment Opportunity Commission, subject to the standards and procedures prescribed by this chapter, may place an additional ten positions in the Equal Employment Opportunity Commission in GS-16, GS-17, and GS-18 for the purposes of carrying out title VII of the Civil Rights Act of 1964."

Sec. 14. The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter.

SUPREME COURT, U. S.

NOV 6 197

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-351

SAVANNAH SUGAR REFINING CORPORATION,

Petitioner,

—v—

ADAM BAXTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

Opinions Below

The opinion of the district court (Pet. App. pp. 1a-19a)[1] is reported at 350 F.Supp. 139. The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. pp. 21a-41a) is reported at 495 F.2d 436. The order of the court of appeals denying rehearing is reprinted at Petitioner's Appendix p. 42a.

Jurisdiction

Jurisdiction of this Court is founded upon 28 U.S.C. §1254(1).

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[1] This form of citation refers to the Appendix to the Petition for Certiorari filed in this Court on September 27, 1974.

Questions Presented

1. Did the court of appeals erroneously allocate the burden of proof with respect to the relief required in a Title VII case following an uncontested finding of discrimination based upon race?

2. Were Petitioner's discriminatory promotional practices mandated by state law?

3. Did the court of appeals err in holding that, despite Petitioner's efforts to end discrimination, it continued unlawfully to deny promotions to its black employees?

Statement of the Case

Until it begins describing the ruling of the district court (Petition, p. 4), the Statement of Petitioner accurately sets forth the history of this litigation. At that point, however, the Statement strays from the record. It conspicuously omits mention of the district court's ruling that Petitioner's promotional practices violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (Pet. App. 11a-12a), a ruling not contested by Savannah Sugar on appeal.

The Court of Appeals affirmed the district court's finding that Petitioner's promotional policies, in general, violated Title VII, and expressly approved the trial court's adoption of affirmative remedies to cure that discrimination (Pet. App. 30a). It also agreed that Respondent Baxter had not himself been the victim of discrimination in the Company's failure to promote him to the position of Relief Boiler Room Operator. The appeals court did not agree, however, with the trial court's ruling that monetary relief was not required. It held that the trial court had imposed

an improper burden of proof in requiring Respondent to show, in a trial where the issue was whether the Company had discriminated in the first instance, that individual members of the class were entitled to such relief (Pet. App. 33a). The Court of Appeals also ruled that good faith efforts by the Company provided no defense to a back pay award where discrimination continued despite those good faith efforts (Pet. App. 32a).

ARGUMENT

Petitioner is thoroughly confused as to the meaning of this Court's decision in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, and the decision of the United States Court of Appeals for the Fifth Circuit in *United States* v. *Jacksonville Terminal Company*, 451 F.2d 418 (C.A. 5), cert. denied 406 U.S. 906 (1972). Both those decisions deal with the *order of* proof and the *nature* of proof (separate issues which Petitioner does not recognize as such) required to prove discrimination. Neither of those opinions are addressed—as is the opinion in issue here—to the order or nature of proof required to show the necessity for monetary relief *once discrimination against a class has been shown.* Accordingly, Petitioner's arguments are irrelevant and ill-conceived.

Petitioner suggests that the opinion below is in conflict with those cases which have denied back pay where the employer's discriminatory conduct was mandated by state law. That suggestion is obtuse. Petitioner's further suggestion of similarity between the facts of this case and those of *Parham* v. *Southwestern Bell Telephone Company*, 433 F.2d 421 (C.A. 8), is equally vacuous. There is no reason to grant the writ in this case.

I

The Ruling of the Court of Appeals for the Fifth Circuit Is Entirely Consistent With This Court's Decision in *McDonnell Douglas Corp.* v. *Green.*

The relatively short history of Title VII litigation has spawned three generations of issues. The first generation was born of the procedural aspects of the statute: whether EEOC is required to attempt conciliation before an aggrieved party may bring suit,[2] whether the EEOC may refer to a state agency a charge filed initially with it,[3] whether jury trials are required under the Seventh Amendment,[4] and a host of other such questions. The second-generation issues resolve around what happens to complaining parties after they come to court: what constitutes discrimination,[5] and what manner of proof complainants are required to adduce in order to substantiate their claims.[6] In the third generation of Title VII cases, courts are facing the problem of what to do after a complaining party comes to court and wins, i.e., proves discrimination. The issues presented by this case belong to that third generation.

The egregious flaw in Savannah Sugar's Petition is that it confuses the second-generation issues addressed by this Court in *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792, and by the United States Court of Appeals for the Fifth Circuit in *United States* v. *Jacksonville Terminal Company, supra,* with the third-generation questions of relief which form the basis of the opinion below.

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[2] *Dent* v. *St. Louis-San Francisco Ry. Co.*, 406 F.2d 399 (C.A. 5).

[3] *Love* v. *Pullman Co.*, 404 U.S. 522.

[4] *Johnson* v. *Georgia Highway Express*, 417 F.2d 1122 (C.A. 5).

[5] *Griggs* v. *Duke Power Co.*, 401 U.S. 424.

[6] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792.

In *McDonnell Douglas Corporation* v. *Green, supra*—a second generation case involving only an individual claim of discrimination[7]—this Court held that, with respect to the *order* of proof, the complainant in a Title VII suit has the initial burden of proving discrimination (Step 1). With respect to the *nature* of proof required in Step 1, this Court set forth specifications by which the complainant could have created—and did—a prima facie showing of discrimination. This Court noted, however, that

> The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from the complainant in this case is not necessarily applicable in every respect to differing factual situations. [411 U.S. at 802, n. 13.]

The Court further held that, following plaintiff's *prima facie* showing, the proper *order* of proof requires that the burden shift to the defendant to articulate legitimate, nondiscriminatory reasons for its employment decision (Step 2).

The United States Court of Appeals for the Fifth Circuit in *United States* v. *Jacksonville Terminal Company, supra,* held, with respect to the order of proof, essentially the same thing: the burden of proof was initially on plaintiff to establish a *prima facie* case. With respect to the nature of proof required in Step 1, the Fifth Circuit recognized the principle later established by this Court—that the nature of proof of necessity will depend upon the facts of each case—and held that plaintiff met its burden with its introduction of statistical data. 451 F.2d at 444. With

[7] The court expressly noted that, "The critical issue before us concerns the order and allocation of proof in a private, non-class-action challenging employment discrimination," 411 U.S. at 800. The Court did not address problems of proof arising in class actions where class-wide discrimination practices have been shown.

regard to Step 2, the Fifth Circuit looked to Jacksonville Terminal for a "plausible racially neutral explanation," 451 F.2d at 445—a legitimate, non-discriminatory reason—for its apparently discriminatory policies. In both *McDonnell Douglas* and *Jacksonville Terminal*, the employers were able to meet their Step 2 burden.

The approach of the district court in this case is substantially identical to the approach used in *McDonnell Douglas* and *Jacksonville Terminal*. In essence, the district court found that Respondent met his initial, Step 1 burden of proving discrimination by the introduction of statistical data (see Pet. App., pp. 17a-19a). The court then held that Petitioner failed to carry its Step 2 burden of meeting the *prima facie* showing, because of its lack of objective, ascertainable standards for promotion. It is this Step 2 issue which, as evidenced by its querulous Statement (Petition, pp. 4-8), Petitioner now seeks to relitigate in this Court. Since it took no appeal from the district court's findings, Petitioner can not now be heard to complain that the court of appeals' express approval (Pet. App. 30a) of the district court's findings is erroneous.

It is not the second-generation issue of discrimination which forms the substance of the opinion below, but the third-generation issue of appropriate relief following a finding of discrimination. And, it is upon that issue that the court of appeals differed with the holding of the district court. With respect to the *order* of proof on appropriate relief, the court of appeals held that it was improper to require plaintiff to establish entitlement of individual class members to monetary relief prior to the resolution of the discrimination issue. That holding in no way conflicts with *McDonnell Douglas Corporation* v. *Green, supra, United States* v. *Jacksonville Terminal Company, supra,* or any other Title VII case of which Respondent is aware.

In fact, that holding is in accord with the practice of lower courts both within and without the Fifth Circuit.[8] Not only is the Court of Appeals ruling amply supported by those other cases; it is eminently sensible.

If Petitioner's argument can be read at all to attack the Court of Appeals' approach to the relief issue, it does not, as the titles suggest, assail the court's allocation of the *order* of proof. Rather, Petitioner quarrels with the *nature* of proof which will be required of individual class members to establish their entitlement to back pay. That issue was not before the Court of Appeals, and was wisely and appropriately remanded by it to the district court for that determination to be made. Cf. *Louisiana* v. *United States,* 380 U.S. 145, 154ff; *Local 53, International Association of Heat & Frost Insulation and Asbestos Workers* v. *Vogler,* 407 F.2d 1047 (C.A. 5). The ruling of the Court of Appeals therefore provides no basis whatsoever for issuing the writ.

II

Petitioner's Racially Discriminatory Promotional Policies Were Not Mandated by State Law.

Petitioner argues that, since an award of back pay is within the trial court's discretion, and since the Court of Appeals failed to invoke the magic words, "abuse of discretion" in reversing the trial court (Petition, p. 17), the opinion below creates an "immutable" conflict with *Kober* v. *Westinghouse Electric Corporation,* 480 F.2d 240 (C.A. 3); *Manning* v. *General Motors Corporation,* 466 F.2d 812 (C.A. 6); and *Schaeffer* v. *Yellow Cabs, Inc.,* 462 F.2d 1002 (C.A. 9). Petitioner's argument has no merit. Each

[8] *Boles* v. *Union Camp Corporation,* 57 F.R.D. 46, 52 (S.D.Ga.); *Harvey* v. *International Harvester Co.,* 56 F.R.D. 47, 48 (N.D.Cal.).

of those cases involved sex discrimination claims where the employment practices under attack were mandated by state protective legislation. The denial of back pay in these cases was based on the presumptive constitutionality of state legislative enactments and the fact that their mandatory nature put the employers on the horns of a dilemma from which only a federal court Title VII ruling could release them. Those cases, and a few others like them,[9] comprise the universe of appeals court decisions which have affirmed the exercise of discretion by lower courts in denying back pay, where discrimination and resultant economic loss was proved. Petitioner can take no comfort in those cases. It had a completely free hand to adopt and implement its promotional policies, and was under no state-imposed obligation to allow its all-white supervisory staff to be the sole arbiter of qualifications (See Pet. App. pp. 10a-11a, 30a). The facts of *Kober, Manning* and *Schaeffer* have nothing to do with the facts of this case of voluntary private discrimination. Accordingly there exists no conflict of authorities.

III

Good Faith Efforts Which Fail to Terminate Discrimination Are No Defense to a Back Pay Award Under Title VII.

Petitioner argued below, and the district court so held, that its good faith efforts to end its discriminatory practices was reason enough to deny back pay to those members of the class who had suffered economically as a result of those practices (Pet. App., p. 13a). The Fifth Circuit re-

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[9] *Ash* v. *Hobart Mfg. Co.*, 483 F.2d 289 (C.A. 6); *Wernet* v. *Pioneer Foods Co.*, 484 F.2d 403 (C.A. 6); *LeBlanc* v. *Southern Bell Tel. & Tel. Co.*, 460 F.2d 1228 (C.A. 5), cert. denied 409 U.S. 990.

versed, holding that neither an employer's beneficence nor his malevolence are proper criteria to apply in determining appropriate relief (Pet. App., p. 32a).

Petitioner argues that the Court of Appeals' reversal has created a conflict with the Eighth Circuit's ruling in *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (C.A. 8). That argument ignores the plain mandate of *Griggs* v. *Duke Power Co.*, 401 U.S. 424, where this Court held that

> . . . good intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability. . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. [401 U.S. at 432, emphasis the Court's.]

Both the *Parham* court and the court below in this case followed that mandate: they examined the consequences —not the motivation—of the employment practices under attack. In *Parham*, the court found that Southwestern Bell had embarked on a good faith journey toward equal employment opportunity *and had succeeded.* In this case, both the trial court and the Court of Appeals found that, despite Petitioner's good faith efforts, discrimination continued unabated (Pet. App., pp. 9a-10a, 32a).

The Fifth Circuit in this case and the Eighth Circuit in *Parham* used the same analytical approach to determine the relief required. The results were different because the facts were different: Southwestern Bell had stopped discriminating; Savannah Sugar had not. Those differing factual situations do not amount to conflicts of rulings of law. There is therefore no reason to grant the writ on that basis.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the writ should be denied.

Respectfully submitted,

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